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NO. 89329

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NATIONAL TOOL AND MFG. CO.,  
PETITIONER,

V.

VINCENT LEPORE,  
RESPONDENT.

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF NEW JERSEY

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RESPONDENT'S BRIEF IN OPPOSITION.

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VINCENT LEPORE  
PRO-SE  
RESPONDENT  
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55/142

QUESTIONS PRESENTED

The decision of the N.J. Supreme Court, which affirmed the decision of the Appellate Division of N.J. Superior Court, addressed the Questions Presented by the respondent. The Appellate Division of N.J. Superior Court correctly stated that the Questions Presented in this action are the following:

"...(1) whether there exists a tort remedy for the discharge of a union employee in retaliation for reporting workplace safety violations to the Occupational Safety and Health Administration;

(2) whether state court litigation of such retaliatory discharge is preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (LMRA);

(3) whether state court litigation of such retaliatory discharge is preempted by the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. (OSHA)."

224 N.J. Super. at 466.

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RESPONDENT'S BRIEF IN OPPOSITION

---

The respondent requests that the Supreme Court of the United States deny the petition for writ of certiorari seeking review of the decision of the N.J. Supreme Court. The decision of the N.J. Supreme Court is reported at 115 N.J. 226 (1989).

STATEMENT

The N.J. Supreme Court, in affirming the decision of the Appellate Division of N.J. Superior Court, correctly ruled that an employee under a collective bargaining agreement may seek redress in state court for a discharge in retaliation for reporting workplace safety violations. The ruling further held that a tort remedy for such a retaliatory discharge is not preempted by either Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 or the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651 et seq.

REASONS FOR DENYING THE WRIT

The respondent will explain three (3) reasons why the petitioner has not provided any arguments of substance that would be a prerequisite for the U.S. Supreme Court to grant a request for a re-

view on a writ of certiorari. First, the petitioner has not demonstrated any instance where the ruling of the N.J. Supreme Court is in conflict with any applicable decisions of the U.S. Supreme Court. Second, the petitioner has not demonstrated any instance where the ruling of the N.J. Supreme Court is in conflict with the decisions of other state courts of last resort or the courts of federal appeals. And third, the petitioner has not demonstrated any instance where the ruling of the N.J. Supreme Court has raised any new arguments pertaining to federal law.

In addition to, and explained within, the three (3) mentioned reasons, the U.S. Supreme Court should deny the request for a review on a writ of certiorari, because the petitioner has not demonstrated the ability to properly state the Questions Presented on the record. The Questions

Presented in the petition for a writ of certiorari are not the questions on the record. The Questions Presented by the respondent are the questions on the record.

Both the N.J. Supreme Court and the Appellate Division of N.J. Superior Court were not exactly presented those Questions Presented by the petitioner. The Questions Presented by the petitioner do not accurately describe the action addressed in the decision of the N.J. Supreme Court, and in the decision of the Appellate Division of N.J. Superior Court. The respondent's action is not properly stated.

By not accurately stating the Questions Presented in the petition for a writ of certiorari, the petitioner fails to properly address the rulings of the N.J. State Courts. The arguments of the petitioner are not clear. Therefore, because the arguments of the petitioner are not accurate, the petition for a writ of certiorari should be denied.

1    The Ruling Rendered By The New Jersey  
Supreme Court Does Not Conflict With Any  
Applicable Decisions Of The United States  
Supreme Court

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The ruling rendered by the N.J. Supreme Court, which affirmed the decision of the Appellate Division of N.J. Superior Court, in the case of Vincent Lepore v. National Tool and Mfg. Co., 115 N.J. 226 (1989), 224 N.J. Super. 463 (1988), does not conflict with any applicable decisions of the U.S. Supreme Court. The petitioner has not demonstrated any instance where the ruling rendered by the N.J. Supreme Court is in conflict with any U.S. Supreme Court decision.

The principles from U.S. Supreme Court decisions were applied in the rulings of the N.J. State Courts. These principles serve as the basis for the consistency of the decisions in the U.S. Supreme Court. See, Allis Chalmers Corp. v. Lueck, 105 S. Ct. 1910; Lingle v.

Norge Div. of Magic Chef, Inc., 108 S.  
Ct. 1877 (1989).

The rulings of the N.J. State Courts noted that federal common law, as referenced in the decision in the case of Allis Chalmers Corp. v. Lueck, requires two (2) instances for preemption. The first instance concerns state regulations and federal policy. The second instance concerns federal policy involving relationships covered by the collective bargaining agreement in the private sector.

The rulings of the N.J. State Courts proved that the respondent's tort claim was based on state public policy, enforcing the state right to a safe and healthy workplace. The respondent's common law cause of action stands independent of the collective bargaining agreement. This is not an action on employer and union agreements or contractual provisions. The right for this action exists independent of the

collective bargaining agreement. The contract is not in dispute, but the retaliatory discharge for exercising a state right is. The rulings of the N.J. State Courts annunciated the premise that parties cannot contract for what is illegal, and public policy illegalities cannot be addressed in contract. Therefore, no preemption exists. The Appellate Division of N.J. Superior Court stated the following:

"In contrast, the right of employees to a safe workplace, and the corresponding right to report violations are grounded in state and federal law. They are rights held by all workers independent of any collective bargaining agreement. **Providing** a judicial forum for the **vindication** of these rights does no violence to the balance between labor and management achieved through collective bargaining. And a claim of retaliatory action taken against the exercise of those rights requires no analysis or interpretation of any terms of the collective bargaining agreement." 224 N.J. Super. at 476.

The Appellate Division of N.J. Superior Court further stated the following:

"Providing plaintiff with a state tort remedy, thus, will do no harm to the private interests of the parties to the collective bargaining agreement or to the policy of 301 that disputes involving those interests should be resolved under uniform federal common law. It will on the other hand, give full recognition to the strong state policy against penalizing an employee's efforts to exercise safe workplace rights." 224 N.J. Super. at 477.

The decision of the U.S. Supreme Court, in the case of Allis Chalmers Corp. v. Lueck, emphasized the independent nature of a state right. The U.S. Supreme Court stated the following:

"In extending the pre-emptive effect of 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." 105 S. Ct. at 1912.

Similarly, the U.S. Supreme Court decision in the case of Lingle v. Norge Div. of Magic Chef, Inc. held that a state tort claim is not preempted by Section 301 of the Labor Management Relations Act (LMRA),

29 U.S.C. § 185, if it stands independent of the contract. The claim can proceed, as long as no interpretation of the collective bargaining agreement is required.

The N.J. Supreme Court, in referencing the U.S. Supreme Court's decision in the case of Lingle v. Norge Div. of Magic Chef, Inc., ruled that the respondent's cause of action has an independent basis in state law. The N.J. Supreme Court stated the following:

"As Lingle makes clear, a suit based on an independent state cause of action does not undermine a collective bargaining agreement." 115 N.J. at 228.

The rulings of the N.J. State Courts are consistent with three (3) principles held in the U.S. Supreme Court's decision in the case of Lingle v. Norge Div. of Magic Chef, Inc. First, the rulings of the N.J. State Courts demonstrated that the claim did not depend on the meaning of the collective bargaining agreement.

Second, the rulings of the N.J. State Courts satisfied the requirement that the state claim can proceed, as long as no contractual interpretation was necessary, even if the same factual considerations were addressed. And third, the rulings of the N.J. State Courts were in line with the principle that judges interpret public policy, while arbitrators interpret contracts.

As in line with the decision of the U.S. Supreme Court in the case of Lingle v. Norge Div. of Magic Chef, Inc., the rulings of the N.J. State Courts, allowing the respondent to proceed with action, does no harm to the balance of the contract, nor does it interfere with any administrative remedy under the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651 et seq. The public policy of the State of N.J. is the source of an independent action separate from that of a con-

tract.

The U.S. Supreme Court recognized the consistency of the decision in the case of Lingle v. Norge Div. of Magic Chef, Inc. with that of other decisions on the same matter. The U.S. Supreme Court stated the following:

"(c) The result in this case is consistent both with the policy of fostering uniform, certain adjudication of disputes over the meaning of collective-bargaining agreements, and with cases that have permitted separate fronts of substantive rights to remain unpre-empted by other federal labor law statutes. Interpretation of collective-bargaining agreements remains firmly in the arbitral realm; judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective-bargaining agreements. There is nothing novel about recognizing that substantive rights in the labor relations context can exist without interpreting collective-bargaining agreements." 108 S. Ct. at 1878.

The respondent has demonstrated that the principles that serve as the basis

for the consistency of the decisions of the U.S. Supreme Court have been applied in the rulings of the N.J. State Courts. The ruling of the N.J. Supreme Court is consistent with U.S. Supreme Court decisions.

2    The Decision Of The New Jersey Supreme Court Is Not In Conflict With The Decisions Of Other State Courts Of Last Resort Or The Courts Of Federal Appeals

The ruling of the N.J. Supreme Court is not in conflict with the decisions of other state courts of last resort or the courts of federal appeals. The petitioner has not demonstrated any instance where the decision of the N.J. Supreme Court is in conflict with the decisions of other state courts of last resort or the courts of federal appeals. The rulings by the N.J. State Courts, in the case of Vincent Lepore v. National Tool and Mfg. Co., 115 N.J. 226 (1989), 224 N.J. Super. 463 (1988), are in line with U.S. Supreme Court decisions, as well as consistent with the decisions of other state courts of last resort and the courts of federal appeals.

The consistency of the decisions on both the state courts of last resort

level and the circuit court of appeals level, as well as the consistency of the decisions by the U.S. Supreme Court, whose principles are applied to the two (2) mentioned levels, was referenced by the rulings of the N.J. State Courts in the respondent's state action. It should be noted that when referencing the consistency of the decisions of the state courts of last resort and the courts of federal appeals, it is necessary to include additional U.S. Supreme Court decisions which either upheld or maintained this consistency. The consistency in these decisions is based on the principle that state claims concerning discharges in violation of a state right are not preempted by Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 or the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651 et seq. See, Herring v. Prince Macaroni-

of New Jersey, Inc., 799 F. 2d 120 (3rd Cir. 1986): Baldracchi v. Pratt and Whitney Aircraft Div., United Tech., 814 F. 2d 102 (2nd Cir. 1987): Peabody Galion v. Dollar, 666 F. 2d 1309 (10th Cir. 1981): Garibaldi v. Lucky Food Stores, Inc., 726 F. 2d 1367 (9th Cir. 1984), cert. den. 471 U.S. 1099, 105 S. Ct. 2319, 85 L. Ed. 2d 839 (1985); Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 85 Ill. Dec. 475, 473 N.E. 2d 1280, (Sup. Ct. 1985), cert. den. 472 U.S. 1032, 105 S. Ct. 3513, 87 L. Ed. 2d 642 (1985): Pan American World Airways v. Puchert, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985): Puchert v. Agsalud, 67 Haw. 25, 677 P. 2d 449 (1984): Paige v. Henry J. Kaiser Co., 826 F. 2d 857 (9th Cir. 1987).

The rulings of the N.J. State Courts displayed consistency with decisions that state no preemption by § 301 of the LMRA exists for common law tort causes of ac-

tion for employees covered by a collective bargaining agreement. The decisions cited by the N.J. State Courts maintained the principle that public policy rights cannot be bargained away. Arbitration is not accepted in the State of N.J. as a deterrent in protecting public policy rights. See, Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974); Barrantine v. Arkansas Best Freight Systems, Inc., 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981).

The N.J. State Courts referenced the Third Circuit Court of Appeals decision, in the case of Herring v. Prince Macaroni of N.J., Inc., in order to depict a discriminatory analysis should the employee covered by a collective bargaining agreement be denied a basic public policy right to a safe and healthy workplace. The Appellate Division of N.J. Superior Court referred to the Third Circuit Court of

Appeals decision on the matter:

"Furthermore, we think it evident an at-will employee would have an available tort remedy for a retaliatory discharge for reporting workplace safety violations. We do not think other, perhaps similarly situated, employees should be denied the same remedy simply because they are members of a union. Cf. Herring v. Prince Macaroni of New Jersey, 799 F. 2d 120, 123-124 (3rd Cir. 1986) ('we think it is unlikely where the (New Jersey) legislature has declared an employment practice unlawful as to all employees, and the courts have recognized an action at law to enforce that declaration, that contractual employees as a class would, or could, be relegated to any remedies provided under their collective bargaining agreements for the selfsame illegal practices'). " 224 N.J. Super. at 473.

The rulings of the N.J. State Courts are also consistent with a Second Circuit Court of Appeals decision in the case of Baldracchi v. Pratt and Whitney Aircraft Div., United Tech... The decision of the Second Circuit Court of Appeals referenced the U.S. Supreme Court's decision to deny a grant for a petition for a writ of cer-

toriari in the case of Pan American World Airways v. Puchert, which was an appeal from a decision of the Supreme Court of the State of Hawaii in the case of Puchert v. Agsalud. The Second Circuit Court of Appeals stated the following:

"The United States Supreme Court dismissed the appeal for want of a substantial federal question. If the Hawaii law were preempted by the R.L.A., the case would necessarily have presented the Court with a substantial federal question." 814 F. 2d at 106.

The decision of the Supreme Court of the State of Hawaii, as referenced by the Second Circuit Court of Appeals, was similar to the Third Circuit Court of Appeals decision in the case of Herring v. Prince Macaroni of N.J., Inc.. The Second Circuit Court of Appeals maintained consistency in the principles of its decision by displaying a discriminatory analysis should the employee covered by a collective bargaining agreement be denied a state right. The Second Circuit Court of Appeals stated the

following:

"In an analagous circumstance, the Supreme Court stated, 'It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefitting from state labor regulations imposing minimal standards on non-union employers.' Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756, 105 S.Ct. 2380, 2398, 85 L. Ed. 2d 728 (1985)." 814 F. 2d at 107.

The Supreme Court of the State of Hawaii stated in the case of Puchert v. Agsalud that a wrongful discharge claim was not preempted by the collective bargaining agreement or federal labor laws. Even though the considerations for dispute resolution concerning the Railway Labor Act (RLA), 45 U.S.C. § 151 et seq., were similar, if not more stringent, to the National Labor Relations Act (NLRA), § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq., the Supreme Court of the State of Hawaii ruled that state statutes prohib-

iting unlawful discharge are a matter of state concern. The Supreme Court of the State of Hawaii stated the following:

"Thus, Puchert's only means of having his cause of action heard is through the administrative and judicial procedures prescribed by state statute. Furthermore, the state statute on which Puchert relies in advancing his unlawful discharge claim is not pre-empted by the R.L.A.. The state has a substantial interest in the welfare of workers who are injured in the course of their employment and to see that they are not penalized for pursuing remedies granted to them by statute. Such regulation by the state does not interfere with the scheme and purpose of the R.L.A.." 667 P. 2d at 456.

The decision of the Second Circuit Court of Appeals, in the case of Baldracchi v. Pratt and Whitney Aircraft Div., United Tech., further maintained consistency by stating that a cause of action based on the law of the State of Connecticut could not be preempted. The Second Circuit Court of Appeals stated the following:

"...the right under the Connecticut statute is absolute and cannot be waived." 814 F. 2d at 103.

The decision by the Supreme Court of the State of Illinois, in the case of Midgett v. Sackett-Chicago, Inc., also displayed consistency. The Supreme Court of the State of Illinois stated the following in depicting a discriminatory analysis:

"We consider, however, that in order to provide a complete remedy it is necessary that the victim of a retaliatory discharge be given an action in tort, independent of any contractual remedy the employee may have based on the collective bargaining agreement." 473 N.E. 2d at 1283.

The ruling of the N.J. Supreme Court is also consistent with the Tenth Circuit Court of Appeals decision in the case of Peabody Galion v. Dollar. The three (3) principles concerning preemption, annunciated by the Tenth Circuit Court of Appeals, were applied in the

rulings of the N.J. State Courts.

The first "rationale" concerned the "supremacy clause principle". This principle addresses congressional intent. The rulings of the N.J. State Courts effectively displayed how congressional intent via the OSHA regulations encouraged states to "adopt" a scheme of safety and health in the workplace, and to implement whatever enforcement mechanisms were necessary to ensure those standards.

The second "rationale" concerned the "primary jurisdiction theory". The rulings of the N.J. State Courts clearly satisfied the requirements of this principle by proving that a state public policy action can proceed, as long as no interpretation of the collective bargaining agreement is required.

The third preemption "standard" concerned the "frustration test". This standard examined the intent being asserted

by the state and evaluates the effect on federal labor policies. The rulings of the N.J. State Courts have demonstrated that a state action, enforcing state public policy rights, stands independent of the terms and conditions of the collective bargaining agreement, which represents federal labor policies.

Similar to the Tenth Circuit Court of Appeals decision in the case of Peabody Galion v. Dollar was a Ninth Circuit Court of Appeals decision in the case of Garibaldi v. Lucky Food Stores, Inc. It should be noted, that both of the just mentioned consistent decisions were prior to the U.S. Supreme Court decision in the case of Allis Chalmers Corp. v. Lueck, 471 U.S. 202, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985), which displayed a similar consistency. The Ninth Circuit Court of Appeals determined that a state cause of action, based on public

policy, stands independent of the employment relationship. The Ninth Circuit Court of Appeals stated the following:

"Thus, it is clear that California's interest in providing a cause of action for violation of public policy or a statute is the enforcement of the underlying statute or policy, not the regulation of the employment relationship." 726 F. 2d at 1347.

The principles concerning preemption have been proven to be consistent. The evolution of cases concerning preemption, up to and including the U.S. Supreme Court decision in the case of Lingle v. Norge Div. of Magic Chef, Inc., 108 S. Ct. 1877 (1988), have maintained consistency with these principles.

As mentioned in the first section, concerning the consistency of the N.J. Supreme Court ruling with U.S. Supreme Court decisions, the rulings of the N.J. State Courts were consistent with the principles in the decision of the U.S.

Supreme Court in the case of Lingle v. Norge Div. of Magic Chef, Inc... One important principle of that particular U.S. Supreme Court decision being that a state claim can proceed, as long as no contractual interpretation was necessary, even if the same factual considerations were addressed. This principle of consistency, as has been displayed, was evidenced in the Tenth Circuit Court of Appeals decision in the case of Peabody Galion v. Dollar. The Tenth Circuit Court of Appeals had claimed that despite similarities, a state cause of action based on public policy rights can proceed, as long as it is independent of the workings of the LMRA. The Tenth Circuit Court of Appeals, in referencing the consistency of the U.S. Supreme Court's decisions in the cases of Alexander v. Gardner-Denver Co. and Barrentine v. Arkansas Best Freight Systems, Inc., stated the following on

the matter:

"In the Barrentine decision, the Supreme Court recognized the unsuitability of non-contractual disputes for binding resolution in accordance with procedures established by collective bargaining. The Court said '(w)hile courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.' Id. at 737, 101 S.Ct. at 1443. The Court further said, quoting from Gardner-Denver, '(t)he distinctly separte nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly, no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.' Id. at 728, 101 S.Ct. at 1447.

It is thus apparent that the contention of Peabody that the arbitration clause bars this action is wholly lacking in merit." 666 F. 2d at 1322-1323.

The N.J. Supreme Court ruling was also consistent with the Ninth Circuit Court of Appeals decision in the case of Palge v. Henry J. Kaiser Co. The N.J. State Courts

referenced the case to further analyze the enforcement of state public policy concerning workplace safety and health. The Ninth Circuit Court of Appeals determined that no preemption exists for a retaliatory discharge enforcing public policy. The Appellate Division of N.J. Superior Court referenced the following from that decision:

"As the Court noted:

'...California's OSHA regulations protect all workers, irrespective of any labor agreement. State health and safety standards benefit all employees as individual workers, not because they are or are not members of a collective bargaining association. And California's interest in providing this private cause of action is the enforcement of the underlying statute or policy, not to regulate the employment relationship...' 826 F. 2d at 863." 224 N.J. Super. at 479.

Similarly, the rulings of the N.J. State Courts have maintained consistency by properly determining that both classes

of employees, at-will and those covered by a collective bargaining agreement, should have equal access to common law rights for a safe and healthy workplace. Providing a common law remedy for both classes of employees allows the State of N.J. to maintain a balance in enforcement and deterrence. The Appellate Division of N.J. Superior Court stated the following:

"To the contrary, permitting an employee to pursue a state tort remedy is entirely consistent with the overall congressional intent of encouraging states to 'assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws...' 29 U.S.C. § 651(b) (11). See Cerracchio v. Alden Leeds Incorporated, 223 N.J. Super. 435 (App. Div. 1988) (holding OSHA does not preclude an employee from pursuing a tort action for a retaliatory discharge). See Kilpatrick v. Delaware County Soc., 632 F. Supp. 542, 548 (E.D.Pa. 1986). Cf. Paige v. Henry J. Kaiser Co., *supra*, 826 F. 2d at 864." 224 N.J. Super. at 483.

The N.J. Supreme Court properly ruled that the State of N.J. is obligated, as a

matter of public policy, to carry out and enforce the scheme of federal and state safety and health regulations. The common law remedy is utilized by the State of N.J. to ensure the federal objective of safety and health in the workplace. The wrongful discharge tort is the State of N.J.'s enforcement mechanism, independent of OSHA's administrative remedy, against a retaliatory discharge for exercising a state right to a safe and healthy workplace.

The Third Circuit Court of Appeals decision in the case of N.J. State Chamber of Commerce v. Hughey, 774 F. 2d 587 (3rd Cir. 1985), also recognized the role of the **state** in enforcing safety and health standards. The Third Circuit Court of Appeals stated the following:

"29 U.S.C. § 667(a). The statute provides that states may develop and enforce 'standards relating to any occupational safety or health issue with re-

spect to which a Federal standard has been promulgated'..." 774 F.2d. at 592.

The N.J. Supreme Court ruling was consistent with the Third Circuit Court of Appeals decision in the case of N.J. State Chamber of Commerce v. Hughey. The Appellate Division of N.J. Superior Court, in referencing the Third Circuit Court of Appeals decision, stated the following:

"To the contrary, as previously indicated, OSHA specifically permits individual states to adopt a scheme of health and safety regulations along with enforcement procedures so long as such standards are at least as vigorous as those required by OSHA and have been approved by the Secretary of Labor, 29 U.S.C. 667(b), (c). Beyond that, OSHA gives states express authority to regulate areas of health and safety not governed by an OSHA standard, 29 U.S.C. 667(a). Thus preemption under OSHA arises only where a state law or regulation concerns an occupational safety and health matter governed by a specific federal standard and only where an approved state plan is not in effect. See N.J. State Chamber of Commerce v. Hughey, 774 F.2d 587, 593 (3rd Cir. 1985)." 224 N.J. Super. at 482.

The consistency of the decisions of the state courts of last resort and the courts of federal appeals serve as a strong foundation upon which respondent will demonstrate that petitioner's arguments are without merit. Petitioner has not presented any argument of substance.

Petitioner attempts to bring before the U.S. Supreme Court distorted arguments in a failed attempt to bring about a scene of conflict. In fact, it is in the flawed arguments of the petitioner that additional justification is evidenced for the rulings of the N.J. State Courts.

The N.J. State Courts were already presented the same arguments concerning the cases of Wolk v. Saks Fifth Ave. Inc., 728 F. 2d 221 (3rd Cir. 1984); Braun v. Kelsey-Hayes Co., 635 F. Supp. 75 (E.D. Pa. 1986); Olguin v. Inspiration Con-

solidated Copper Co., 740 F. 2d 1468 (9th Cir. 1984); United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960). The allegedly conflicting decisions of the cases relied on by the petitioner are distinguishable on the facts. The cases are also distinguishable by the law. The misstated facts by the petitioner in these cases have already been clarified by the rulings of the N.J. State Courts.

The rulings of the N.J. State Courts addressed all the arguments of the petitioner. The N.J. State Court rulings reviewed other cases in evaluating the petitioner's arguments. The N.J. State Court rulings answered all of the petitioner's questions.

Petitioner has once again displayed a twisted interpretation of the decisions in the cases of Wolk v. Saks Fifth Ave. Inc. and Braun v. Kelsey-Hayes Co.. The facts concerning these cases are different. The decisions in these cases concern the limitations of the wrongful discharge law of the State of Pennsylvania. Relying on these limitations, the petitioner argues that a common law cause of action can only take place when an employee has no statutory remedy. The public policy of the State of Pennsylvania is different. In the State of Pennsylvania, a common law cause of action can proceed only if no statutory remedy exists. However, the wrongful discharge law of the State of N.J. does not have that limitation. The subject of discussion in the petitioner's arguments is not preemption, but individual state concerns. **The basis for the application of a wrongful discharge law**

is a matter of state concern.

Contrary to the petitioner's arguments, the Appellate Division of N.J. Superior Court noted that the decision in the case of Wolk v. Saks Fifth Ave. Inc. does not address the OSHA preemption issue. However, the decision in the case of Kilpatrick v. Delaware County Soc., 623 F. Supp. 542 (E.D.Pa. 1986), as referenced by the Appellate Division of N.J. Superior Court, did address the issue of OSHA preemption. The decision in the case of Kilpatrick v. Delaware County Soc. determined that a common law cause of action in the State of Pennsylvania is not preempted by OSHA. The decision in the case of Kilpatrick v. Delaware County Soc. stated the following:

"Moreover, neither the Third Circuit nor the Pennsylvania Supreme Court has explicitly held that the existence of a federal remedy for adverse discrimination by an employer preempts Pennsylvania common law actions for wrongful

termination." 623 F. Supp. at 549.

Petitioner has again mistakenly referred to the decision in the case of Olguin v. Inspiration Consolidated Copper Co. Petitioner claims that the public policy of the State of N.J. is void because the remedy afforded by OSHA is exclusive. In this particular case, the petitioner claims that the Federal Mine Safety and Health Act (FMSHA), 30 U.S.C. § 24, was the sole remedy for discharge. The decision in that case determined that claims for retaliatory discharges for reporting safety complaints cannot take place, unless state laws, regulations, and policies are involved. The decision in that case noted that no specific statutes or policies were referenced in the State of Arizona. Unlike the State of N.J., the State of Arizona chooses not to enforce federal laws. The decision in

the case of Olguin v. Inspiration Consolidated Copper Co. stated the following:

"Arizona has little interest in enforcing federal law, even if that federal law is incorporated, as Olguin suggests, in the state's general public policy." 740 F. 2d at 1475.

The State of N.J. does not have this limitation on its wrongful discharge law.

Again, the subject of discussion in the petitioner's arguments is not preemption, but individual state concerns.

As explained before, the retaliatory discharge law of the State of N.J. is the enforcement mechanism for public policy. Laws and regulations are among the sources of the State of N.J.'s public policy. To further emphasize the public policy of the State of N.J., the Appellate Division of N.J. Superior Court stated the following:

"Moreover, our concept of public policy has been broadly defined to include all legislation, administrative rules and regula-

tions, and judicial decisions, Pierce, supra, 84 N.J. at 72, with no artificial boundaries drawn between federal or state lines. Cf. Allen v. Commercial Casualty Insurance Co., 131 N.J.L. 475, 477-478 (E. and A. 1944)." 224 N.J. Super. at 471.

The N.J. State Court rulings noted that the State of N.J. has a strong common law tradition concerning safety and health in the workplace. It is this strong common law tradition that serves as a source of the State of N.J.'s public policy. In the decision in the case of Lingle v. Norge Div. of Magic Chef, Inc., the U.S. Supreme Court recognized the development of common law as an expression of a state's public policy. The U.S. Supreme Court stated the following:

"Illinois courts have recognized the tort of retaliatory discharge for filing a worker's compensation claim, Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 23 Ill. Dec. 559, 384 N.E. 2d 353 (1978),<sup>6</sup> and have held that it is applicable to employees covered by union con-

tracts, Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 85 Ill. Dec. 475, 473 N.E. 2d 1280 (1984), cert. denied, 474 U.S. 909, 106 S.Ct. 278, 88 L.Ed. 2d 243 (1985).

6. Although the cause of action was not based on any specific statutory provision, the following section of the Illinois Worker's Compensation Act expresses the public policy underlying the common-law development:..."

108 S.Ct. at 1881-1882.

Petitioner once again refers to the decisions in the cases of United Steelworkers of America v. American Manufacturing Co., United Steelworkers of America v. Enterprise Wheel and Car Corp., and United Steelworkers of America v. Warrior and Gulf Navigation Company in claiming that the exclusive remedy is arbitration. The rulings of the N.J. State Courts properly dismissed this argument. The federal policy of arbitration concerns the collective bargaining agreement. State public policy concerns

a state right. The rulings of the N.J. State Courts referenced the decisions of the U.S. Supreme Court in the cases of Alexander v. Gardner-Denver Co. and Barrentine v. Arkansas Best Freight Systems, Inc. in distinguishing the system of "private law" from that of "public law". Arbitrators address the "law of the contract", not the "law of the land". State public policy rights do not have a source in contract, but in state law. Arbitrators cannot consider public policy matters. As mentioned before, in examining the decision of the Tenth Circuit Court of Appeals in the case of Peabody Galion v. Dollar, state action enforcing a state public policy right stands independent of the terms and conditions of the collective bargaining agreement which represents federal labor policies.

Petitioner's presentation of the decision in the case of Zombro v. Baltimore

City Police Department, 868 F. 2d 1364 (4th Cir. 1989) is completely baseless. The decision in that case concerned a dispute involving whether a cause of action had a source as a federal constitutional right or a federal statutory right. The decision in that case has absolutely no relevance, whatsoever, to a common law cause of action for wrongful discharge based on state public policy.

Petitioner's final arguments rely on the decision in the case of San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), in another distorted attempt to claim that the rulings of the N.J. State Courts have upset federal policy. In the decision in the case of Peabody Galion v. Dollar, the Tenth Circuit Court of Appeals examined the decision in the case of San Diego Building Trades Council v. Garmon when evaluating the three (3) principles concerning pre-

emption. The Tenth Circuit Court of Appeals emphasized the fact that the U.S. Supreme Court has maintained that the "Garmon doctrine" must yield when a state considers a matter of being of significant interest. Again, the State of N.J. has a strong common law tradition concerning workplace safety and health. The wrongful discharge tort is the State of N.J.'s enforcement mechanism, standing independent of the terms and conditions of the collective bargaining agreement and standing independent of OSHA's administrative remedy, for exercising a state right to a safe and healthy workplace. The Tenth Circuit Court of Appeals stated the following on the matter:

"The Supreme Court has discouraged the inflexible application of the Garmon doctrine, especially where the state has a substantial interest in regulation of the conduct at issue and the state's interest is one that does not threaten undue interference with the federal

regulatory scheme. Farmer v. United Brotherhood of Carpenters, supra, 430 U.S. at 290, 97 S.Ct. at 1058; The Court has recognized exceptions to the preemption doctrine in cases that fulfill the just mentioned standard." 666 F. 2d at 1315.

The U.S. Supreme Court's decision in the cases of Allis Chalmers Corp. v. Lueck and Lingle v. Norge Div. of Magic Chef, Inc., have further applied the principles concerning preemption as displayed in the Tenth Circuit Court of Appeals decision in the case of Peabody Galion v. Dollar. Petitioner's arguments relying on the decision in the case of San Diego Building Trades Council v. Garmon fail.

The rulings of the U.S. Supreme Court are to be controlling in the decisions of the state courts of last resort and the courts of federal appeals. The N.J. Supreme Court is the ultimate authority as to state law. The N.J.

State Courts correctly ruled on the issues.

The basis for the application of a wrongful discharge law is a matter of state concern. Although the basis for the application may vary from state to state, that determination by itself does not give rise to conflict. This is where the petitioner continually misses the point. Public policy differs from state to state as a matter of state concern. The respondent's common law cause of action is one concerning state law. The N.J. Supreme Court has made a ruling concerning state law.

The N.J. Supreme Court ruling is consistent with U.S. Supreme Court decisions respective of individual state concerns. In filing a petition for writ of certiorari, the petitioner is not contesting the ruling of the N.J. Supreme Court, but rather the principles of the applicable

U.S. Supreme Court decisions, which allows the N.J. State Supreme Court ruling to stand. In essence, the petitioner has filed an application requesting that the U.S. Supreme Court review its decisions. The petitioner's filing of a petition for writ of certiorari is without merit. The petitioner's request for a writ of certiorari should be denied.

The respondent has demonstrated that the well reasoned ruling of the N.J. Supreme Court is consistent with the decisions of other state courts of last resort and the courts of federal appeals. The decision of the N.J. Supreme Court is not in conflict with the decisions of other state courts of last resort or the courts of federal appeals.

3    The New Jersey Supreme Court Ruling  
Does Not Raise Any New Arguments Per-  
taining To Federal Law

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The ruling of the N.J. Supreme Court, in the case of Vincent Lepore v. National Tool and Mfg. Co., 115 N.J. 226 (1989), 224 N.J. Super. 463 (1988), does not raise any new arguments pertaining to federal law. Petitioner's arguments, in the filing of a petition for writ of certiorari, introduces nothing that hasn't already been addressed in the rulings of the N.J. State Courts or in the decisions of the U.S. Supreme Court. The U.S. Supreme Court should deny the petition for writ of certiorari for want of a substantial federal question.

CONCLUSION

The respondent requests the U.S. Supreme Court to deny the petition for a writ of certiorari.

VINCENT LEPORE  
PRO-SE  
RESPONDENT

Dated: October 6, 1989